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# In The
# Supreme Court Of The United States

No. 82-247

OCTOBER TERM, 1982

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**MANCHESTER ENVIRONMENTAL COALITION**
**and**
**MICHAEL DWORKIN**
*Petitioners*

v.

**ENVIRONMENTAL PROTECTION AGENCY, ET AL**
*Respondents*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

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## QUESTION PRESENTED FOR REVIEW

Whether the denial, without opinion, of costs and attorney's fees to a successful petitioner, suing for violations of the Federal Clean Air Act, 42 U.S.C. §7401 *et seq.*, violates §7607(f) of the Act.

## PARTIES

The Petitioners are Manchester Environmental Coalition and Michael Dworkin (hereinafter, "Petitioners"). The Respondents are the United States Environmental Protection Agency, Connecticut Fund for the Environment, Inc., John Walton, The State of Connecticut, National Retail Merchants Association, National Realty Committee and International Council of Shopping Centers (hereinafter, "Respondents").

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which appears at p. 1 of the Appendix, *infra*, is reported at 672 F.2d 998 (2d Cir. 1982).

The adverse court order from which certiorari is sought is not reported and was issued without a written opinion. The Petitioners' Motion to Reconsider the Court's Denial of Attorney's Fees and Costs of Suit, made pursuant to Rule 27(c) and (h) of the Rules of The United States Court of Appeals for the Second Circuit, together with the Court's denial of the same, dated May 14, 1982, are reprinted at pp. 33A, 34A of the Appendix, *infra*. The original Motions for Attorney's Fees and Costs dated February 23, 1982, and the Court's denial of the same dated April 9, 1982, are reprinted at pp. 50A, 53A, of the Appendix, *infra*.

## JURISDICTION

The order denying Petitioners' Motion for Attorney's Fees and Costs was entered on April 9, 1982. A Motion for Reconsideration was entertained and denied on May 14, 1982.

This petition for certiorari is being filed within ninety (90) days from the denial of Petitioners' Motion to Reconsider below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

## RELEVANT STATUTES

**42 U.S.C. Section 7607(f):**

**Costs.** In any judicial proceeding under this section, the Court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

## STATEMENT OF THE CASE

On February 20, 1981, the Petitioners filed a joint Petition to Review a Final Order of the Environmental Protection Agency (hereinafter, "EPA"), together with Connecticut Fund for the Environment, Inc. and John Walton, challenging a national EPA policy allowing conditional approval of State Implementation Plans required under the Clean Air Act, 42 U.S.C. Section 7401, *et seq.* Said policy is set forth in EPA regulations published in the Federal Register, Vol. 45, No. 248, Tuesday, December 23, 1980, 84769-84787. Jurisdiction of this case in the United States Court of Appeals for the Second Circuit is founded upon 42 U.S.C. Section 7607(b), Appendix p. 62A

On February 1, 1982, the Second Circuit issued its decision granting the petition in part, vacating the EPA order in part, and remanding the case for a revised order. Appendix p. 1A.

Subsequent to Petitioners' partial victory, Petitioners moved, on March 3, 1982, pursuant to 42 U.S.C. Section 7607(f) for an award of costs of suit,

including reasonable attorney's fees. Appendix pp. 50A, 53A. These motions were denied by the Court without opinion on April 9, 1982. Appendix pp. 51A, 54A.

Petitioners then moved on April 26, 1982, pursuant to Rule 27(c) and (h) of the Rules of the U.S. Court of Appeals for the Second Circuit for a Reconsideration of the Court's denial of its Motion for Costs of Suit, including reasonable attorney's fees. Appendix p. 33A. This motion was denied by the Court on May 14, 1982, again without written opinion. Appendix p. 34A.

## ARGUMENT

### I.

### A. THE RULING OF THE SECOND CIRCUIT IN THIS CASE CONTRAVENES CONGRESSIONAL INTENT AND CONFLICTS WITH RULINGS OF OTHER FEDERAL COURTS OF APPEALS AND WITH THE SUBSTANCE OF PRIOR DECISIONS OF THIS COURT, AND THEREFORE MUST BE REVERSED.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court held that absent Congressional authority, courts are not allowed to award environmental plaintiffs attorney's fees. Accordingly, Congress amended the judicial review section of The Clean Air Act to allow litigants to recover the costs of bringing suit, including reasonable attorney's fees. 42 U.S.C. Section 7607(f) *as amended by* Clean Air Act Amendments of 1977. Pub. L. No. 95-95, Section 307(f), ___ 91 Stat. 778 *(amending* 42 U.S.C. Section 1857(h)(4) (1976)). The House Report on this amendment, H.R. Rep. No. 294, 95th Cong. 1st Sess. 337 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077, 1416, states:

> In the case of the Section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the Court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1388 (1st Cir. 1973).

Despite this clear statement of Congressional intent, courts have differed in their determination of when an award of attorney's fees under the Clean Air Act is "appropriate." In *Sierra Club v. Gorsuch*, 672 F.2d 33, 39 (D.C. Cir. 1982), the Court held that it was appropriate to award fees to a nonprevailing party as long as the party "substantially contribute[s] to the goals of the [Clean Air] Act." *Accord, Northern Plains Resource Council v. EPA* 670 F.2d 847 (9th Cir. 1982), *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42 (D.C. Cir. 1982). As stated in *Northern Plains Resource Council, supra*: "The test is whether in light of what was known ... when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorney's fees." 670 F.2d at 848. An opposite view, as expressed by Judge Wilkey in his dissent in *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), holds that the word "appropriate" as used in the Clean Air Act means that attorney's fees can only be awarded to parties if they prevail. In the present case, since the Court's denial of attorney's fees was issued without an opinion, it can

only be assumed that this latter standard was followed, and that Petitioners were denied an award of fees because they did not prevail on every issue raised in the case. Assuming *arguendo* that attorney's fees can only be awarded to prevailing parties under Section 307 of the Act, other Circuits have expressly held that plaintiffs who are only partially successful may be considered prevailing parties "if they succeed on any significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit" (emphasis added). *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). *Accord, Busche v. Burkee*, 649 F.2d 509 (7th Cir.), *cert. denied*, 70 L.Ed.2d 212, 102 S.Ct. 396 (1981).

The Second Circuit's denial of attorney's fees in this case not only conflicts with the decisions of other circuits, but also with prior decisions of the Second Circuit itself. In *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977) and in *Manchester Environmental Coalition v. EPA*, 612 F.2d 56 (2d Cir. 1979), the predecessor to this case, in which the Plaintiff was represented by the undersigned, the Court awarded attorney's fees. However, in neither case did the Court set forth either a standard for determining when an award of attorney's fees is "appropriate", or the factors to be used in calculating the amount of such an award.

In *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, this Court had occasion to review various statutory provisions allowing attorney's fees, distinguishing between statutes which mandate an award of attorney's fees and those which allow courts to award such fees in their discretion. Although the Clean Air Act numbers among this latter group of statutes, (see 421 U.S. 261 at n. 35), the *Alyeska* Court, in discussing another discretionary statute, Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-e(b), noted that

> We have held that Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 19 L.Ed.2d 1263, 88 S.Ct. 964 (1968).

421 U.S. at 262.

Likewise, in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), the court relied upon the legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(K), to hold that "the courts' discretion to deny a fee award to a prevailing plaintiff is narrow. Absent 'special circumstances,' ... fees should be awarded." 447 U.S. at 68. Similarly, the legislative history of the Clean Air Act mandates an award of attorney's fees in this case.

Recognizing the importance of attorney's fees in encouraging litigation by private attorneys[1] general, this Court has not hesitated, in the past, to review Circuit Court decisions concerning awards of attorney's fees. See, *e.g.*, *Alyeska*, *supra*, *New York Gaslight Club*, *supra*, and *Newman v. Piggie Park*, *supra*. The interpretation of the provision at issue here, Section 307 of the Clean Air Act, 42 U.S.C. §7607, should be accorded even

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[1]Environmental acts containing similar provisions include Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. §1365; the Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping Act), 33 U.S.C. §1415(g); Section 12 of the Noise Control Act of 1972, 42 U.S.C. §4911; Section 11 of the Endangered Species Act of 1973, 16 U.S.C. §1540(g); Section 16 of the Deepwater Port Act of 1974, 33 U.S.C. §1515; Section 1449 of the Safe Drinking Water Act, 42 U.S.C. §300j-8; Section 7002 of the Resource Conservation and Recovery Act of 1976 (Solid Waste Disposal Act), 42 U.S.C. §6972; Section 20 of the Toxic Substances Control Act, 15 U.S.C. §2618; Section 520 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1270; and Section 23 of the Outer Continental Shelf Land Act, 43 U.S.C. §1349.

more important since a number of environmental statutes allowing the discretionary award of attorney's fees contain similar language and evidence a similar legislative history. The need for private enforcement of these environmental statutes is underscored not only by the legislative history of the various attorney's fee provisions but also by the Congressional concern over the inability of the EPA to properly enforce various environmental statutes by way of administrative action evidenced by recent Congressional hearings on this subject.

Not only do federal courts need this Court's guidance in determining when an award of attorney's fees is "appropriate" under the Clean Air Act and similar environmental legislation, they also need guidance in calculating the amount of attorney's fees to be awarded in any given case. Two recent cases, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), have attempted to set forth standards and factors to be considered in determining a "reasonable" award of attorney's fees.[2] Although the criteria set forth in *Johnson* have been adopted by a number of Circuits, (see *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974), *Prate v. Friedman*,

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[2]These criteria are: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill necessary to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for such a case; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of damages involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express*, supra, at 717-719.

538 F.2d 42, 48 (2d Cir. 1978); *Barber v. Kimbrell's, Inc.*, 572 F.2d 216, (4th Cir. 1978)), as has the analysis set forth in *Copeland*,[3] the application of these criteria is far from uniform. Despite the noble efforts of lower courts to develop some workable formula for calculating reasonable attorney's fees in a uniform manner, the lack of any authoritative standard has resulted in excessive litigation concerning such awards. Considerations of judicial economy therefore support the need for an authoritative opinion from this Court.

## B. THE OPINION DENYING ATTORNEY'S FEES SHOULD BE VACATED AS THE COURT'S FAILURE TO ARTICULATE A REASON FOR ITS DENIAL CONSTITUTES AN ABUSE OF DISCRETION.

In exercising whatever degree of discretion it has in awarding or denying attorney's fees, a court must articulate the reasons for its decision. To deny discretionary fees without stating a reason constitutes an abuse of discretion. *Murphy v. Kolovitz*, 635 F.2d 662, 664 (7th Cir. 1981); *Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396*, 637 F.2d 506 (8th Cir. 1980); *Sethy v. Alameda County Water District*, 602 F.2d 894, 897 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978). Similarly, awarding attorney's fees based upon inappropriate considerations renders an award improper and subject to

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[3]Under the *Copeland* analysis: "The attorney's fee is computed by first determining the 'lodestar', i.e., the number of hours reasonably expended multiplied by a reasonable hourly rate. The 'lodestar' fee may then be adjusted up or down to reflect the quality of representation and the contingent nature of success."
*Environmental Defense Fund v. EPA*, 672 F.2d 42, 51 (D.C. Cir. 1982).

reversal. *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981); *Hedrich v. Hercules, Inc.* 658 F.2d 1088 (5th Cir. 1981); *Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496 (2d Cir. 1980).

In the present case, Petitioners, for the purpose of securing this Court's review of the Second Circuit's decision denying attorney's fees, have been forced to guess at the reasons for the court's denial. To allow such a denial of fees, without opinion, flies in the face of the aforementioned legislative history of the Clean Air Act, as well as conflicting with relevant case law. To allow the Second Circuit's decision to deny attorney's fees to a successful litigant to stand would create a dangerous precedent which can only cripple enforcement, not only of the Clean Air Act, but if a wide panoply of other environmental statutes as well.

As the Court stated in *Sierra Club v. Gorsuch*, *supra*, 672 F.2d at 36:

> The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and uncharted dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself complex and novel. Given the implementation dates, its early interpretation is desirable.

Without this Court's defining "appropriate" in 42 U.S.C. Section 7607(f) and defining the factors relevant to a fee award, the government will be free to continue its reign of litigation terror; not litigation to prevent pollution but rather to prevent enforcement actions by those "private watchdogs of the environment" who have

picked up the environmental banner to protect our country's future. As noted *supra*, a decision in this case would be relevant not only to the attorney's fee provisions in the Clean Air Act, but would apply to a variety of other environmental statutes as well.

To allow any court to deny successful litigants fees would discourage private enforcement of environmental statutes contrary to congressional intent. During these times of federal economic austerity, and limited administrative enforcement action by the EPA, a decision in this case is of utmost importance.

## CONCLUSION

For the foregoing reasons, the decision of the Second Circuit denying Petitioners attorney's fees must be reversed.

RESPECTFULLY SUBMITTED

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